

ORDER NO. 1745

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Robert G. Taub, Vice Chairman;
Mark Acton;
Tony Hammond; and
Nanci E. Langley

Competitive Product Prices
Express Mail Contract 11 (MC2011-14)
Negotiated Service Agreement

Docket No. CP2011-50

ORDER APPROVING AMENDMENT TO EXPRESS MAIL CONTRACT 11
NEGOTIATED SERVICE AGREEMENT

(Issued June 11, 2013)

I. INTRODUCTION

The Postal Service proposes an amendment to Express Mail Contract 11.¹ For the reasons discussed below, the Commission approves the Amendment.

¹ Notice of United States Postal Service of Change in Prices Pursuant to Amendment to Express Mail Contract 11, May 24, 2013 (Notice). The Amendment is attached to the Notice and labeled as Attachment A (Amendment).

In Order No. 644, the Commission approved Express Mail Contract 11 (Contract).² On May 24, 2013, the Postal Service filed notice that it has agreed to the Amendment. The Postal Service subsequently filed supporting financial information and the certified statement required by 39 C.F.R. § 3015.5.³ The Amendment establishes new contract prices and changes the annual price adjustment mechanism for subsequent years of the Contract. Notice, Attachment A at 1-5. It bases the price increases for subsequent years of the Contract on the average increase in prices of general applicability for “Express Mail Commercial Base” and “Express Mail Commercial Plus” rather than the lower of the average increase in prices of general applicability for “Express Mail Retail” and the most recent 12-month change in the Consumer Price Index – All Urban Consumers.⁴ The Amendment also expands upon the responsibilities of the parties with respect to non-public information filed with the Commission. Notice, Attachment A at 5. The Postal Service asserts that the Amendment will not impair the ability of the Contract to comply with 39 U.S.C. § 3633. Supplement, Attachment B.

By its terms, the Amendment becomes effective one business day after the day that the Commission completes its review of the Notice. Notice, Attachment A at 1.⁵

² See Docket Nos. MC2011-14 and CP2011-50, Order Approving Express Mail Contract 11 Negotiated Service Agreement, January 10, 2011 (Order No. 644).

³ Notice of the United States Postal Service of Filing Supplemental Materials for Amendment to Express Mail Contract 11, May 28, 2013 (Supplement). As noted in Order No. 1735, for purposes of 39 C.F.R. § 3015.5(a), the Commission considers May 28, 2013 (the day the Postal Service submitted all information required under that section), to be the date of filing of the Notice. Notice and Order Concerning Amendment to Express Mail Contract 11, May 30, 2013, at 2 (Order No. 1735). In the future, the Postal Service should file all of its supporting information contemporaneously with its Notice.

⁴ Notice, Attachment A at 5; Request of the United States Postal Service to Add Express Mail Contract 11 to Competitive Product List and Notice of Filing (Under Seal) of Contract and Supporting Data, December 17, 2010, Attachment B at 2-3 (Request).

⁵ As discussed below, the Notice states that “[t]he amendment will become effective on the day that the Commission completes its review of this filing.” Notice at 1.

II. COMMENTS

Comments were filed by the Public Representative.⁶ No other interested person submitted comments. The Public Representative states that the prices under the Amendment “are expected to comply with the ‘Standards for Compliance’ established by the Commission in Section 3015.7 of its rules.” PR Comments at 2. However, he contends that the terms of the Amendment are “sufficiently different” from those of the Contract that the Amendment may warrant creation of a new product requiring a filing under 39 U.S.C. § 3642. *Id.* at 1-2.

The Public Representative points to several differences in the price structure of the Amendment, including dividing the contract partner’s customers into two groups and prices based on factors besides weight and zone. *Id.* at 2. The Public Representative argues that these differences change transportation costs under the Contract and may affect the discussion of the impact of the Contract on competitors. *Id.* He recommends that the Commission request the Postal Service to re-file the Amendment under both 39 C.F.R. §§ 3015.5 and 3020.30. *Id.* at 2-3.

III. COMMISSION ANALYSIS

The Commission has reviewed the Notice, the accompanying materials filed under seal, and the comments filed by the Public Representative.

Cost considerations. The Commission reviews competitive product prices to ensure that they meet applicable requirements of 39 U.S.C. § 3633(a) and 39 C.F.R. § 3015.7.

The original contract established prices that would apply in the first contract year and provided annual adjustments for each of the four subsequent contract years. The Amendment simply establishes “contract prices” and an annual adjustment for “subsequent years of the contract,” without specifying the contract year to which the new contract prices or the subsequent adjustments apply. Notice, Attachment A at 1, 5.

⁶ Public Representative Comments, June 6, 2013 (PR Comments).

The contract prices described in section I.D. of the contract appear to be intended to apply to the third contract year and the annual adjustments described in section I.E. appear to be intended to apply in the fourth and fifth contract years.

For the third contract year, the Amendment establishes two categories of prices, reflected on two tables, labeled “A” and “B.” *Id.* at 1-5. For Table A, the Amendment establishes annual price increases for the fourth and fifth years of the Contract based on the average increase in prices of general applicability for “Express Mail Commercial Base.” *Id.* at 11. For Table B, the price increases for the fourth and fifth years are based on the average increase in prices of general applicability for “Express Mail Commercial Plus.” *Id.* The original Contract calculated increases for all prices based on the lower of the average increase in prices of general applicability for “Express Mail Retail” and the most recent 12-month change in the Consumer Price Index – All Urban Consumers. Request, Attachment B at 4-5.

The supporting revenue and cost data show that the Contract, as amended, should cover its costs during its third year. Although, as the Public Representative notes, the Amendment alters the transportation costs under the contract, it does not affect the ability of the contract as a whole to cover costs.

Based on its analysis of the supporting data, the Commission finds that the Contract as amended comports with the provisions applicable to rates for competitive products in 39 U.S.C. § 3633(a) and 39 C.F.R. § 3015.7.

Establishment of new product. The Public Representative urges the Commission to request that the Postal Service make an additional filing under 39 U.S.C. § 3642 and 39 C.F.R. § 3020.30, reasoning that the pricing structure under the Amendment is so different from the pricing structure of the original Contract that the Postal Service has created an entirely new product. PR Comments at 2-3.

Section 3642 allows the Postal Service, users of the mail, and the Commission to request that the market dominant and competitive product lists of the Mail Classification Schedule be changed by “adding new products to the lists, removing products from the lists, or transferring products between the lists.” 39 U.S.C. § 3642(a). Express Mail

Contract 11 is a standalone product. The Postal Service does not propose to remove Express Mail Contract 11 from the competitive product list or to transfer it to the market dominant product list.

The Amendment does not change the type of mail that is the subject of Express Mail Contract 11. It does not change the expiration date of the Contract. It does not change the identity of the contract partner, nor does it alter the basic characteristics of the contract partner's customers. Instead, it establishes new prices for contract years three through five and divides the pool of the contract partner's customers into groups and offers customized prices for each group. In the context of this Contract, the changes to the pricing structure made by the Amendment are not, on their own, sufficient to require a filing under 39 U.S.C. § 3642.

The focus of 39 U.S.C. § 3642 is the assignment of products to either the market dominant product list or the competitive product list. The Commission's responsibility under 39 U.S.C. § 3642 with respect to a new product is to assign that product to either the market dominant product list or the competitive product list. The Public Representative does not contend that the Contract, as amended, is wrongly classified as competitive. As such, it is not clear what regulatory purpose, if any, would be served by requiring the Postal Service to re-file under 39 U.S.C. § 3642 and 39 C.F.R. § 3020.30.

The Public Representative raises a concern about the Amendment's impact on competitors. However, he does not explain how the changes to the Contract alter the Contract's impact on competitors or why the competitive marketplace cannot adequately address such concerns. Additionally, no competitor filed comments asserting that the Amendment would have a competitive impact distinct from the impact of the original Contract. Accordingly, the Commission does not find that the Amendment gives rise to a competitive concern under 39 U.S.C. §§ 3642 or 3633.

Other considerations. The Notice states that the Amendment will become effective on the day that the Commission completes its review. Notice at 1. However, the Amendment itself states that it "shall become effective one business day after the

Commission issues all necessary regulatory approval.” *Id.* Attachment A at 1. While presumably the Amendment is controlling, the Postal Service shall promptly notify the Commission of the effective date of the Amendment.

The confidentiality provisions of section V of the Contract, as modified by the Amendment, are consistent with the Commission’s rules for the treatment of non-public information. See 39 C.F.R. part 3007. They appear to have no effect on the ability of the contract to comply with 39 U.S.C. §§ 3633(a) or 3642.

Within 30 days of the expiration of the Contract, as amended, the Postal Service shall file the annual (by contract year) costs, volumes, and revenues disaggregated by weight and zone associated with the Contract.

In conclusion, the Commission approves the Amendment to Express Mail Contract 11.

IV. ORDERING PARAGRAPHS

It is ordered:

1. As set forth in the body of this Order, the Commission approves the Amendment to Express Mail Contract 11.
2. The Postal Service shall promptly notify the Commission of the effective date of the Amendment.
3. Within 30 days after Express Mail Contract 11, as amended, terminates, the Postal Service shall file the annual (contract year) costs, volumes, and revenues disaggregated by weight and zone associated with the contract.

By the Commission.

Shoshana M. Grove
Secretary